Dato' Soo Lai Sing v Kumpulan Sierramas (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2(S5) 22–502 OF 2000
AZMEL J
3 JUNE 2004

Contract — Misrepresentation — Sale and purchase of property — Unique security features to be provided within housing estate — Whether purchaser relied on such features in purchasing property — Time for execution of services — Whether failure to provide service tantamount to misrepresentation — Whether standard of service promised sufficient and adequate — Contracts Act 1950 s 18

Contract — Damages — Sale and purchase of property — Breach — Failure to provide adequate security service — Negligence — Whether proven — Assessment of damages — Whether purchaser entitled to claim for loss of goods stolen — Contracts Act 1950 s 74(1)

In the promotional brochures and sales campaign for Sierramas Resort Homes ('the housing estate'), the first defendant had stated that a unique and special security features would be provided by the second defendant within the housing estate to ensure the safety and tranquillity of its residents. The plaintiff purchased a housing lot and moved into the housing estate. Subsequently, he was robbed when the house was broken into ('the said incident'). The plaintiff commenced an action against the defendants for damages arising from the defendants' failure, neglect and/or carelessness which resulted in the said incident.

The issues raised, *inter alia*, were: (i) whether the robbery was due to the failure, neglect and/or carelessness of the defendants; and (ii) whether the plaintiff's claim for damages due to the defendants' negligence be allowed.

Held, allowing the plaintiff's claim:

(1) On the facts, the first defendant did represent to the plaintiff that it would provide special security features at the housing estate and for this reason, the plaintiff was completely persuaded to purchase a housing lot to later reside there. Such security features must exist and must be in operation at the time when any purchaser had come to stay in the house he purchased in the housing project. Since the first defendant had failed to provide the special security features as represented, such omission tantamount to an act of misrepresentation (see paras 11 and 13).

(2) The second defendant had committed neglect and carelessness in maintaining the security of the residence in the housing estate. The mobile guards on duty were poor in covering the area concerned, in absence of the CCTV cameras and the electronic system to the perimeter fencing (see paras 17 and 18).

(3) The plaintiff was allowed to recover from the defendants the value of his personnel property lost during the robbery, in the form of special damages amounting to RM486,988 plus interest at the rate of 8%pa from the date of this suit till the date of settlement (see para 23).]

A [**Bahasa Malaysia summary**

Di dalam risalah promosi dan kempen jualan untuk Sierramas Resort Homes ('taman perumahan tersebut'), defendan pertama telah menyatakan bahawa satu sistem keselamatan yang unggul dan istimewa akan disediakan di taman perumahan tersebut oleh defendan kedua bagi memastikan **B** keselamatan dan keselesaan penduduk taman perumahan tersebut. Plaintif telah membeli satu lot perumahan dan pindah ke rumah dalam taman perumahan tersebut. Kemudiannya, dia telah dirompak bilamana rumahnya telah dipecahmasuk ('insiden tersebut'). Plaintif memulakan prosiding terhadap defendan untuk ganti rugi yang disebabkan oleh kegagalan, kecuaian dan/atau kelalaian defendan-defendan yang mana telah menyebabkan berlakunya **C** insiden tersebut.

Isu-isu yang dibangkitkan, antara lain, adalah: (i) sama ada kecurian tersebut berpunca daripada kegagalan, kecuaian dan/atau kelalaian defendan-defendan; dan (ii) sama ada tuntutan gantirugi plaintif terhadap defendan-defendan dibenarkan.

D

Diputuskan, membenarkan tuntutan plaintif:

(1) Berdasarkan fakta, defendan pertama sememangnya telah memberi representasi kepada plaintif bahawa ia akan menyediakan sistem keselamatan yang istimewa di taman perumahan tersebut dan kerana **E** sebab inilah, plaintif terpengaruh untuk membeli satu lot di taman perumahan tersebut untuk menetap di situ. Sistem sekuriti sedemikian harus wujud dan berfungsi apabila mana-mana pembeli mula menetap di rumah yang dibeli dalam taman perumahan tersebut. Oleh kerana defendan pertama gagal untuk menyediakan sistem keselamatan yang istimewa seperti yang dikatakan olehnya, maka kegagalan tersebut **F** dianggap sebagai perbuatan salah nyata fakta (lihat perenggan 11 dan 13).

(2) Defendan kedua telah cuai dan lalai dalam menjaga keselamatan penghuni di taman perumahan tersebut. Pegawai keselamatan bergeraknya lemah dalam mengawal kawasan berkenaan, dengan ketiadaan kamera CCTV dan sistem elektronik pada perimeter berpagar (lihat perenggan 17 dan 18).

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(3) Plaintif dibenarkan menuntut nilai harta bendanya yang telah dicuri daripada defendan-defendan, dalam bentuk gantirugi khas berjumlah RM486,988 dengan faedah pada kadar 8% setahun dari tarikh perbicaraan ini sehingga tarikh penyelesaian (lihat perenggan 23).]

H **Notes**

For cases on misrepresentation involving sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3890–3892

For cases on damages involving sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2893–2997

I

Cases referred to

Tham Cheow Toh v Associated Metal Smelters Ltd [1972] 1 MLJ 171 (refd)

Legislation referred to

Contracts Act 1950 ss 18, 74(1)

SS Tieh (Olivia Ho with him) (Paul Ong & Assoc) for the plaintiff.
Maidzuara Mohammed (TM Yap with her) (Logan Sabapathy & Co) for the defendants.

Azmel J:

[1] In this case, the plaintiff claimed against the defendants for damages arising from the defendants' failure, neglect and/or carelessness which had caused a robbery committed at the plaintiff's house.

[2] The brief facts of the case are as follows. The promotion for the sale of housing lots of the first defendant's housing project known as Sierramas Resort Homes had been extensively advertised. Brochures had been distributed to the public stating the provision of special features of the said housing project thereby making it unique as compared to other housing projects. What was specifically stressed on the provision of the special features was the provision of special or unique security measures that would ensure the safety and tranquility of the residents staying in the said housing project. The plaintiff was made aware of this project through one Arthur Tan of Tan & Tan Development Bhd who persuaded the plaintiff to attend the soft launch of the project on 10 March 1995 at the headquarters of Tan & Tan at Jalan Tun Razak, Kuala Lumpur.

[3] The plaintiff did attend the soft launch of the said project and made inquiries from the first defendant's staff regarding the uniqueness of the said project. In their explanation regarding the nature of the special features to be provided by them, the defendant's employees and agent informed the plaintiff that type of security measures to be provided would include electronic perimeter fencing and CCTV cameras. In addition, they would also provide 24 hours security guards on duty together with security dogs. These security features were told to the plaintiff mainly by one Rena Lam (DW4). And any doubts that the plaintiff might have had as regards the special security features were eventually removed when confirmed to the plaintiff by one KC Chong (DW3), the marketing and sales director of Tan & Tan Development Bhd. On the strength and belief of such representations, the plaintiff immediately made a decision to purchase a housing lot in the said housing project even though he was fully aware that the purchase price of this lot was much higher than the price of similar lots at other housing projects. The selling point was the provision of the special security features to be provided in this housing project. According to the arrangements, the responsibilities of providing such security features and enforcing such security actions were given to the second defendant.

[4] The plaintiff together with his wife and children moved into the house constructed on the lot which he purchased sometime in October 1999, fully convinced that he had nothing to fear or worry as regards the security and safety of him and his family while staying in this new house. However on 10

March 2000 at about 8am while the plaintiff and members of his family were still sleeping, three persons broke into his house. The robbers took away valuable items belonging to the plaintiff and his family namely, cash in Singapore dollars and Malaysian Ringgit, Rolex watches, jewelleries, hand phones, Dunhill pens, a shotgun and other miscellaneous items. The total value of the items taken away by the robbers was approximately RM486,988. A police report was subsequently lodged by the plaintiff in respect of the said robbery.

[5] From the investigation, it was revealed that the robbers gained entry into the housing estate by cutting open the perimeter fencing adjacent to the plaintiff's house. At the time of the incident, the defendants had not caused the perimeter fencing to be electronically installed. Nor were the CCTV cameras in operation.

[6] The only issue that had to be determined in this case is whether the robbery that took place at the plaintiff's house was due to the failure, neglect and/or carelessness of the defendants.

[7] At the hearing, there was only one witness for the plaintiff, while the defendants called five witnesses including Rena Lam (DW4) and KC Chong (DW3).

[8] In consideration of the evidence adduced at the hearing, it was my finding that the first defendant did represent to the purchasers of the said housing project that it would provide the special security features at the said housing project. And these special security features would include electronic perimeter fencing, CCTV cameras and 24 hours security guards on duty. That the defendants would provide these special security measures had been clearly stated by the plaintiff (PW1) in his evidence. He went on to state it was because of these special security features to be provided by the defendants that he decided to purchase the lot and to stay in the housing estate. That the defendants had agreed to provide such security features had been admitted by DW3, Chong Kim Chuan. Under cross-examination, DW3 said:

> The unique features of the Sierramas Homes are:
>
> (a) It has perimeter fencing.
>
> (b) It has security entrance with guard house and guard patrol.
>
> (c) It has extensive landscaping.
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> The perimeter fencing have also CCTV cameras monitored from the guard house.

[9] But what appeared to be more convincing and committed is what the Defendants had openly highlighted in their newsletter as regard the unique security features of the Sierramas Homes. At pp 115 and 116 of Bundle C (Admitted Documents), the newsletter claimed as follows:

> To enter an estate, one has to get past the perimeter security, which consists of two aspects; physical security, which at Sierramas takes the form of a special fence, and electronic security.
>
> A perimeter security system — like any good security system — should do three things, which Dimmick refers to as 'the three D's.' It should Deter, Delay and Detect

The Sierramas residential estate is surrounded by a special physical fence manufactured in the UK by TWIL Fencing Products, experts in fencing systems. From an aesthetic point of view, this special mesh exhibits the qualities of a normal fence — by allowing people to see through it, it avoids being a potentially oppressive visual barrier that blocks out views. Yet at the same time it manages to look more daunting than a normal fence, giving the impression of being 'a physical barrier that's going to take some getting through.' This characteristic makes the fence a good deterrent.

More importantly, perhaps, the mesh not only looks forbidding to would be intruders, it is forbidding its small aperture size makes it finger proof and extremely difficult to scale or penetrate. It thus provides a high delay factor, giving security personnel adequate time to respond.

The physical fence on its own, however, is unable to do the third D — detection. This role, therefore, falls to the electronic systems. Employing fibre-optic technology, the system at Sierramas allows security executives to detect any movements or disturbances along the fence.

One way in which this is done is through a device known as a Video Motion Detector. When monitoring a portion of the fence, this video device can recognize movements in the environment through differences in light patterns. Within a given area, anything that moves which should not be moving will set off an alarm. (Emphasis added.)

[10] The provision of such security measures at the Sierramas Homes was reiterated in another issue of the defendants' newsletter as found at p 118 (Bundle C). The relevant portion reads:

Naturally, we want you to safely enjoy the vast open space at Sierramas. And to feel safe, you need not have grills and gates which would make you feel like a prisoner rather that a resort home owner. Here at Sierramas. the entire perimeter is secured so that you can have the peace of mind to enjoy life within it

The security system comprises British-designed perimeter fencing which uses electronic and fibre optic technology. The highly sensitive and intelligent fence is able to detect movements in its vicinity and alert the security personnel via the Video Motion Detector. Because the fence is able to distinguish harmless movements from real intrusion, false alarms are therefore minimized. Also, power cuts will not affect the security system since there is a reliable back-up system.

Apart from the fence, the main entrance and the emergency entrances are monitored 24 hours a day. 'Video Electronic Identification' will identify non-residential vehicles. In additional to the security system, an intercom network is installed to confirm your guests' identities and to announce their arrival. (Emphasis added.)

[11] In the light of the above evidence, I was fully convinced that the defendants did represent to the plaintiff the existence of such special or unique security features in the said housing project which completely persuaded the plaintiff to decide to buy a housing lot there and construct a house and stay there. And when the plaintiff and his family moved in to stay in the house in the Sierramas Homes, it was his full expectation that the defendants had provided him with the said security measures as had been represented to him. In other words, all aspects of security and safety would be well taken care of by the defendants.

[12] But that did not turn out to be true as expected. The plaintiffs house was broken into by three robbers on 10 March 2000 at about 8am. And from the evidence of the cutting of the perimeter fencing near the plaintiff's house it can be conclusively concluded that the robbers entered the housing estate by cutting open the perimeter fence. During the entire robbery until the robbers left with their loot, none of the security guards came to the plaintiff's rescue. Needless to say, the defendants had no knowledge whatsoever of the incident until after they were subsequently informed. What had happened to the electronic perimeter fencing and the CCW cameras which the defendants had promised to provide? The real truth was that on the date of incident the electronic system to the perimeter fencing had not been installed, nor were the CCTV cameras commissioned. From the evidence adduced, the CCTV cameras and the electronic system to the perimeter fencing were commissioned much later after the incident.

[13] The issue to be determined is at which point of time must the defendants install the entire special security system which they had promised to provide. In my view, such security features must exist and must be in operation at the time when any purchaser had come to stay in the house he purchased in the housing project. Hence, in so far as the plaintiff is concerned the defendant should have installed the whole security system from the time the plaintiff occupied the house, ie in October 1999. At the date of incident on 10 March 2000, the defendants had not installed the special security system yet. Had the system of electronic perimeter fencing and CCTV cameras been installed and operational, I am quite certain the security guards would be able to detect the entry of the robbers at the perimeter fence before reaching the plaintiff's house, thereby the robbery at the plaintiff's house could have been aborted. Because the defendants did not provide such unique security system as promised a robbery in broad daylight was allowed to be committed without being detected or known by the defendants' security guards — a real mockery which smacks hard on the faces of the defendants. In the circumstances, it was my conclusion that the first defendant had failed to provide the unique or special security measures as they had earlier represented to the plaintiff. This tantamount to an act of misrepresentation.

[14] The term 'misrepresentation' has been defined under s 18 of the Contracts Act 1950 as follows :

> 18 'Misrepresentation' includes —
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject matter of the agreement.

[15] In the instant case, the plaintiff had decided to purchase the lot in the housing project and stayed in the house together with his family on the representation of the first defendant that they would provide unique security measures which include CCTV cameras and electronic perimeter fencing. When the robbery took place, there was no CCTV cameras installed and the perimeter fence had no electronic system. If the above said security system had been in place, the cutting of the perimeter fence would have been immediately detected thereby alerting the security guards. As such, the robbery could have been aborted. As a result of the robbery, the plaintiff had suffered losses of his personal properties.

[16] The second defendant was fully aware of the type and standard of security that it had to provide to come within the meaning of special security system as expected by the residents which the system the first defendant had earlier on promised and represented. Therefore when they had not installed the electronic perimeter fencing and the CCTV cameras, it would be incumbent upon the second defendant to employ sufficient number of security guards and security dogs on 24 hours duty to ensure that the security of the residents were maintained at a standard that would have been provided by installing electronic perimeter fencing and CCTV cameras.

[17] According to the evidence of Tan Chor Hwa (DW5), the Executive Director of Kumpulan Sierramas, to man the whole housing estate they employed 15 security guards and hired 14 contract guards. These 14 contract guards were hired in the light of the non-functioning of the electronic perimeter fencing and the CCTV cameras. And they thought that would be sufficient to ensure high standard of security.

[18] In my view based on the facts and circumstances of this case, the manning of the security of the housing estate with the number of security guards employed by the defendants was totally insufficient and inadequate. At the time of the robbery, none of the security guards were on duty near the perimeter fence where the entry was made by the robbers. This shows that the area each particular security guard had to cover was either too wide or the guard did not do his job properly. Had there been a security guard nearby, the robbers would not dare to enter the housing estate by cutting the perimeter fence. That the security guards had not been able to detect the occurrence of such robbery, until after the defendants were subsequently informed, indicates clearly the poor and substandard nature of movements and area covered by the mobile security guards on duty. In other words, the manner the robbery was committed would appear as if there were no security guards at all on duty at the housing estate. It appears much worse when the robbery was committed in broad daylight at about 8am. Certainly, the defendants could not claim that they were providing special security features to the housing estate. In the circumstances, the second defendant had committed neglect and carelessness in maintaining the security of the residence in the housing estate.

[19] After having considered the whole facts and circumstances of this case, I found both the defendants liable to the plaintiff.

[20] Based on the evidence adduced at this hearing, it is my conclusion that the plaintiff is entitled to claim damages against both defendants. In this case, the plaintiff had lost his personal properties in the robbery.

[21] The relevant provision of the Contracts Act 1950 in respect of this issue is s 74(1) which states:

> 74(1) When a contract has been broken, the party who suffers the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach.

[22] In the Federal Court case of *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171, Ali FJ, in dealing with measure of damages recoverable from such breach of contract, said (at p 172):

> The measure of damages recoverable involves the consideration of s 74 of the Contracts (Malay States) Ordinance which substantially affirm the rule of common law laid down in *Hadley v Baxendale* (1854) 9 Exch 341 which was in two parts, namely (1) damages arising naturally, ie according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[23] In considering the extent of damages to be awarded, I was of the view that the plaintiff should be allowed to recover from the defendants the value of his personnel property lost during the robbery, in the form of special damages which he claimed in his statement of claim amounting to RM486,988 plus interest at the rate of 8%pa from the date of this suit till the date of settlement. I also awarded cost to the plaintiff. However, I did not give any compensation to the plaintiff in respect of his claim for general damages. Based on the authority of the Federal Court case *Tham Cheow Toh*, I should have also awarded general damages to the plaintiff for the sufferings and traumatic shocks he and his family had undergone due to the robbery. Based on the nature of the unique security system promised to be provided by the defendants, there was very little likelihood that the said robbery could have been committed without being detected by the defendants.

[24] I also awarded costs of this suit to the plaintiff.

Order accordingly.

Reported by Izzaty Izzuddin